Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

MERRIE WARREN TURNER, aka MERRIE FOUTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the context of Turner's peaceful attempts, inside the grounds of a Wichita, Kansas clinic, to reach and counsel with a late third-trimester pregnant woman not to have an abortion which Turner believed was unlawful, did the Tenth Circuit's rejection of her proffered "necessity" or "choice of two evils" defense, denied carte blanche by the trial court, constitute reversible error as unprincipled decision making considering the following:

1. What are the elements, including weight to be given each, of the necessity or choice of two evils defense and what is the minimum threshold proof that must be shown before the defense can be presented to a jury -- all questions reserved and never before answered by the Court, United States v. Bailey, 444 U.S. 394, 410 (1980)?

2. Is the "no other reasonable, legal alternative to violating the law" requirement -- as applied by the Tenth, Ninth, and Third circuits in the form of a "per se" exclusionary rule automatically denying the defense for political protestors to whom Turner was analogized -- in direct conflict with recent Sixth Circuit cases as well as in apparent conflict with United States v. Bailey, 444 U.S. 394, 410 (1980)?

3. Did the Tenth Circuit's application of the "per se" rule deny Turner's constitutional rights to due process and a fair trial by jury where she could confront the Government, her accuser, with testimony and evidence supporting this defense as guaranteed by the Fifth and Sixth amendments?

4. Did the Tenth Circuit err in not ruling that Turner satisfied the minimum proof needed to establish a prima facie necessity or choice of two evils defense?

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Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. F, 13a) is reported at 44 F.2d 900. The judgment of the district court (Apps. D&E, 6a-12a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 24, 1995 (Apps. E&F, 11a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTION/STATUTES INVOLVED

Turner invokes the provisions of: the Fifth and Sixth amendments, United States Constitution (App. G, 21a); 18 U.S.C. § 1509 (App. H, 22a); Reagan's Proclamation No. 5761 (January 15, 1988) (App. I, 23a); Criminal Abortion, KAN. STAT. ANN. § 21-3407 (App. J, 26a); and Abortion, KAN. STAT. ANN. § 65-6703 (App. K, 27a), all of which are extracted and reproduced in the appendixes.

STATEMENT

1. *Federal Jurisdiction Basis/Federal Questions Raised*

Turner was indicted on August 29, 1991, by a Grand Jury in the Federal District Court For the District of Kansas (Sitting in Wichita) (App. A, 1a) for violating 18 U.S.C. § 111 (assaulting certain officers) and 18 U.S.C. § 1509 (obstruction of a court order) in connection with ongoing abortion protests of a Wichita clinic, but only the latter crime was pursued (App. H, 22a). Subsequently, Turner and four others were tried to a jury on November 19

and 20, 1991, resulting in guilty verdicts and denial of new trial motions, United States v. Cooley, 787 F. Supp. 977 (D. Kan. 1992). This judgment was vacated and the case remanded for retrial, United States v. Cooley, 1 F.3d 985 (CA 10 1993) (judicial misconduct requiring recusal).[1]

Turner was retried on November 3-5, 1994, summarily was denied instructions on the necessity or choice of two evils defense (Apps. B&C, 3a-5a), and again convicted by a jury. Judgment was entered on November 16, 1993 (App. D, 6a-10a) and she was sentenced to one year of supervised probation. Turner timely appealed to the Tenth Circuit which upheld her conviction and denial of the necessity defense, United States v. Turner, 44 F.2d 900 (CA 10 [Kan.] 1995) (App. F, 13a) (Turner).

2. ***Operative Facts***

During July and August, 1991, the Tiller clinic in Wichita was the focus of abortion protest by pro-life supporters. The clinic obtained a federal district court injunction prohibiting blocking access into or egress from the facility. Turner was a sidewalk counselor whose own abortion experience resulted in her operating a pregnancy crisis center and engaging in other activities aimed at educating women on the nature of prenatal life including making their own decisions not to have an abortion due to other available options. The Tiller clinic was notorious for performing late third-trimester abortions (App. L, 28a-31a). Turner was aware of this and believed she was acting under the color of law opposing such abortions which she

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[1] In related proceedings, the trial court denied a motion to dissolve the injunction, Women's Health Care Services, P.A. v. Operation Rescue - National, 773 F. Supp. 258 (D. Kan. 1991), which subsequently was reversed, Women's Health Care Serv., P.A. v. Operation Rescue - National, 24 F.3d 107 (CA 10 [Kan.] 1994).

believed were prohibited by Kansas law and Reagan's Proclamation No. 5761 which declared personhood begins at conception and granted the unborn constitutional protections.

The federal Marshals enforcing the injunction were in contact with the abortion protest leaders who informed them large numbers of protestors would converge on the clinic August 20th. On that day, Turner successfully hand-billed and counseled with women near the clinic, convincing them not to have abortions. Later, she noticed a woman in her late third-trimester of pregnancy approaching the clinic in a vehicle which was soon surrounded by a crowd. In order to put herself in a position to be able to speak with this woman, Turner joined several others who scaled the clinic walls. After entering the grounds, Turner, unlike other protestors, knelt and prayed as she made her way forward toward the entrance gate. Turner testified she intended to pray and to place her body between that of the mother coming in, who was uninformed in much the same way she was in 1981, and knowing about the life in her and knowing she would not get the correct information inside based on the reports Turner had on the late term abortions being performed there. It was at this time that Turner and those inside the grounds were arrested by the Marshals whom she did not resist. Turner was not charged with trespass or violating the terms of the injunction, but only with interfering with the Marshal's performance of their official duties.[2]

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[2]The evidence was tenuous at best. On direct examination by the federal prosecutor, Marshall Pekarek testified he did not remember Turner, but after reviewing a video tape, he said she interfered by going over the fence and being in on the inside. Marshall Amico remembered only that Turner prayed a lot and was not necessarily a threat. Even on redirect, Amico said that there was no way to tell whether her conduct constituted a threat. Finally, he agreed with the prosecutor's own characterization of Turner's acts as a

REASONS FOR GRANTING THE PETITION

1. *Summarized*

The petition should be granted for any one or more of the following reasons: a) the "no other reasonable, legal alternative to violation of the law" requirement of the necessity defense -- as applied by the Tenth, Ninth, and Third circuits in the form of a "per se" exclusionary rule automatically denying the defense involving political protestors to whom Turner was analogized -- is in direct conflict with recent Sixth Circuit cases which requires resolution;[3] b) the application of the "per se" rule by these circuits is in apparent conflict and inconsistent[4] with this Court's decision in United States v. Bailey, 444 U.S. 394, 410 (1980) inter alia omitting the modifier "reasonable," lacking a common sense construction, and misinterpreting Bailey's meaning;[5] c) Bailey, 444 U.S. at 410, left important questions unanswered which may be

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potential threat. And, when the trial judge took over the questioning, Amico said he would have felt threatened if even one person came over the fence. It was upon this thin reed of testimony that Turner was convicted, while being denied the opportunity to present testimony and evidence on the necessity defense.

[3] Insurance Corp. v. Companies Des Bauxites, 456 U.S. 694, 700 (1982); Marks v. United States, 430 U.S. 188, 189 (1977).

[4] United States v. Doe, 465 U.S. 605, 610 (1984); Lugar v. Edmondson, 457 U.S. 922, 920 (1982).

[5] Wilkinson v. United States, 365 U.S. 399, 401 (1961).

contributing to lower court misconstruction,[6] inasmuch as Bailey is not free from ambiguity,[7] such as what are the exact modern elements, including the weight to be given each, of the necessity or choice of two evils defense as well as what is the minimum threshold proof that must be shown before a right exists to present the defense to a jury; and d) to consider an important constitutional question of whether the Tenth Circuit's application of the "per se" rule automatically excluding the necessity defense denied Turner's rights to due process and a fair trial by a jury of her peers where she could confront the Government, her accuser, contrary to the guarantees of the Fifth and Sixth amendments.[8] Court review is needed to settle what has become a most troublesome question, the necessity defense, in the administration of justice.[9] Exercising its supervisory jurisdiction[10] this Court should announce a modern restatement of the necessity or choice of two evils defense for uniformity and efficient administration of justice purposes.[11]

Additionally, there is a cloud on the horizon concerning the constitutionality of the "Freedom of Access

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[6] Lehman v. Lycoming County Children Services, 458 U.S. 502, 507 (1982); Brotherhood of Carpenters v. United States, 330 U.S. 395, 400 (1947).

[7] American Textile Mfgrs. Inst. v. Donovan, 452 U.S. 490, 495 (1981); McDaniel v. Sanchez, 452 U.S. 130, 136 (1981).

[8] Pointer v. Texas, 380 U.S. 400, 402 (1965); Edwards v. South Carolina, 372 U.S. 229, 230 (1963).

[9] Linkletter v. Walker, 381 U.S. 618, 620 (1965).

[10] McNabb v. United States, 318 U.S. 332, 341 (1943).

[11] Commissioner v. Bilder, 369 U.S. 400, 501 (1962).

to Clinic Entrances Act (FACE)," 18 U.S.C. § 248, that has been the subject of numerous challenges involving: the commerce clause; freedom of speech, religion, and association; and challenges of being over-broad and vague. So far, FACE has been held unconstitutional by one court, United States v. Wilson, 1995 WL 114802 (E.D. Wisc. 1995), and constitutional by five courts. Woodall v. Reno, 47 F.3d 656 (CA 4 [Va.] 1995), petition for cert. filed, 63 U.S.L.W. 3644 (U.S. Feb. 21, 1995) (No. 94-1417) (whether "free speech" was denied a woman who prayed silently in front of a clinic entrance in an attempt to persuade others to forgo abortions); American Life League, Inc., v. Reno, 47 F.3d 642 (CA 4 [Va.] 1995); Riley v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994). Surely the Court will agree to hear-and-decide the constitutionality of FACE, which inexorably is entwined with the availability and use of the necessity defense. Efficient administration of justice requires these interrelated legal issues be decided symmetrically along complementary lines.

2. ***Necessity or Choice of Two Evils Defense***

Since Congress has not codified the necessity or choice of two evils defense, federal common law controls, Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972). Earlier cases took a restrictive view of the defense, United States v. The Diana, 74 U.S. (7 Wall.) 354, 360-361 (1869); United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868) (Kirby); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133-134 (1851). But United States v. Bailey, 444 U.S. 394, 403-411 (1980) took a modern approach which looked to the Model Penal Code and treatise writers, yet fell short of defining "the precise contours" of the defense, id. at 410. Consequently, the Court has never set forth the complete elements of the defense or the weight to be

given each. Neither has it decided what minimum threshold proof is required to place the defense before a jury. This has led to imprecision, even conflict, between the circuits.

The rationale of the defense is based on public policy:

> [T]he law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law . . . The matter is often expressed in terms of the choice of evils: When the pressure of circumstances presents one with a choice of evils, the law prefers that he avoid the greater evil by bringing about the lesser evil. . . . One may thus be justified by necessity in violating the law and causing harm in order to avoid a greater harm by complying with the law . . . .

W. LaFave & A. Scott, **Substantive Criminal Law** § 5.4 at 629-630 (1986) (**Substantive Criminal Law**). The Tenth Circuit in Turner (App. F, 16 a) listed four elements of the defense: 1) she was faced with a choice of evils and chose the lesser evil; 2) she acted to prevent imminent harm; 3) she reasonably anticipated a direct casual relationship between her conduct and the harm to be averted; and 4) she had no [reasonable][12] legal alternatives to violating

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[12]The Tenth Circuit, Turner (App. F, 16a) omitted the critical modifier "reasonable" as required by Bailey, 444 U.S. at 410, which is characteristic of other circuits misapplying the necessity defense using the "per se" rule. Note, The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon, 81 CAL. L. REV.

the law. This four-part test, or its equivalent, is the most common since it condenses more verbose restatements. See, e.g., **Model Penal Code** § 3.02 (1985 ALI Official Draft & explanatory notes); Substantive Criminal Law § 5.4 at 634-640. Cf. E. Devitt, C. Blackmar & K. O'Malley, *2 Federal Jury Practice and Instructions -- Criminal* § 32.06 (1990). Significantly, Turner needed only to present a minimum of credible evidence at the threshold of the proceedings to establish a prima facie case of necessity so that a reasonable juror could have found in her favor. Bailey, 444 U.S. at 414-415; United States v. Contento-Pachon, 723 F.2d 691, 695 (CA 9 1984); Note, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.L. Rev. 79, 87-88, 111 (1989) (Necessity Defense).

The Tenth Circuit focused exclusively on the fourth element, "no legal alternative to violating the law" as the sole reason for upholding the district court's denial of the "necessity defense, concluding that the defense was foreclosed as a matter of law because she obviously had other legal alternatives of educating and persuading women not to have an abortion: going door-to-door; distributing literature on public property; mailings, etc., Turner (App. F, 17a). In footnote one, the Tenth Circuit acknowledged Turner "entered the clinic to educate a particular [late third-trimester pregnant] woman [but this] does not change our conclusion that legal alternatives were available to her" inasmuch as earlier, before scaling the clinic walls and her arrest, she "first handed literature to the women to educate them as I've done for many years in the past and that they might have an informed decision." Turner (App. F, 17a-18a n. 1). The court did not examine the other three elements because "Ms. Turner's appeal can be resolved solely on the basis that legal alternatives existed to her violating the law and thus, she was not entitled to have the

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351, 367 (1993) (Demise).

jury instructed on the defense of necessity." Turner (App. F, 17a).

a. Tenth, Ninth, and Third Circuits

The premise of Turner rests on a presumption that there always exist "legal alternatives" to violating criminal statutes, what has become known as the "per se" rule, espoused regularly by a triad of courts to negate the necessity defense. United States v. Seward, 687 F.2d 1270, 1276 (CA 10 1982), cert. denied, 459 U.S. 1147 (1983) (Seward) (political protestor trespass at a nuclear power plant) first articulated the concept as a conclusion: "It is obviously not a defense to charges arising from a typical protest," cited in Turner (App. F, 16a). The Ninth Circuit adopted the Seward rationale in United States v. Dorrell, 758 F.2d 427, 432 (CA 9 1985) (unlawfully entering a military reservation for destructive purposes) reasoning that "recourse to the political process to redress his concerns regarding nuclear war" precluded as a matter of law the necessity defense.

Relying on Seward again, United States v. Schoon, 971 F.2d 193, 196 (CA 9), cert. denied, ___ U.S. ___ 112 S. Ct. 2980, 119 L. Ed. 2d 598 (1992) (Schoon) (obstructing the services of an Internal Revenue Service office protesting the U.S. involvement in El Salvador) added even further gloss, ruling that the legal alternative requirement is "met simply by the possibility of congressional action," 971 F.2d at 198 (emphasis added), and "petitioning Congress to change a policy is always a legal alternative," id. at 199 (court's emphasis). The Ninth Circuit then held "[i]ndirect protests of congressional policies can never meet all the requirements of the necessity defense doctrine. Therefore, we hold that the necessity defense is not available in such cases." Id. at 119-200. Turner (App. F, 16a) relies heavily on Schoon but also cited Zal v. Steppe, 968 F.2d 924, 929 (CA 9),

cert. denied, ___ U.S. ___, 113 S. Ct. 656, 121 L. Ed. 2d 582 (1992) (Steppe) (abortion protestors charged with trespass) which reiterated Schoon and cited a Third Circuit's holding that legal alternatives existed to abortion protestors such as going "door-to-door to proselytize their views, distribute literature, personally or through the mails, and contact residents by telephone," Northeast Women's Center v. McMongale, 868 F.2d 1342, 1350-52 (CA 3), cert. denied, 493 U.S. 901 (1989) (Women's Center).

Turner (App. F, 13a) completes the circle, likewise basing its decision on Steppe and Women's Center (App. F, 17a). Turner was categorized like any other generic political protestor for denial of necessity defense purposes. The "per se" rule excluding the necessity defense has been uniformly criticized by legal analysts as: not convincing; misapplying the four prong test; fear of juries evaluating sensitive and emotional claims; a means to save judicial resources; failure to balance constitutional arguments of the right to trial by jury; and other legal misconceptions. Demise, 81 CAL. L. REV. at 352, 357, 366-367; Necessity Defense, 64 N.Y.U.L. REV. at 92, 111. Note, Putting the Government on Trial: The Necessity Defense and Social Change, 33 WAYNE L. REV. 1221, 1233-1234, 1251-1253 (1987) (Government on Trial); Note, The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial, 39 STAN. L. REV. 1271, 1322 (1986) (Silencing the Defendant).

b. Direct Conflict With the Sixth Circuit

United States v. Newcomb, 6 F.3d 1129 (CA 6 1993) (Newcomb) (necessity defense available to felon charged with being in possession of an unregistered firearm), reiterated in United States v. Riffe, 28 F.3d 565 (CA 6 1994) (cited in brackets) (duress defense applicable to unlawful use of mail charge for marijuana distribution), have rejected any kind of "per se illegal, per se contrary to

the law" rationale, Newcomb, 6 F.3d at 1132 [Riffe, 28 F.3d at 570], read Bailey in "broad terms of justification" as formulating a "modern understanding of the necessity defense," Newcomb at 1133 [Riffe, 28 F.2d at 569] (emphasis added), allowing necessity as a defense to a statutory crime, Newcomb at 1134, construed the Bailey language as "broad and would permit either fear to the defendant himself or fear on behalf of a third party to serve as a basis" for its use, id. at 1135 n. 5 (emphasis added), and held necessity exists "when it is an emergency measure, necessary to avoid an imminent injury -- an injury sufficiently grave . . . according to objective standards," id. at 1135. The defense is available "so long as there is even weak supporting evidence," id. at 1132 [Riffe, 28 F.3d at 569-570], because one charged with a crime has a right to have a jury pass on the adequacy of a defense. Finally, surveying its own opinions and other circuits, the Sixth Circuit concluded that pretrial denial of the defense was proper only when the defendant's "illegal conduct spanned a long period of time," ruling that the defense was a jury question where there was "evidence that the emergency situation unfolded rapidly, almost spontaneously, and [the defendant's] criminal conduct lasted for mere minutes, Newcomb at 1137. In other words, "there was a crisis situation that simply did not allow [the defendant] the luxury of choosing from among several alternatives," id.

The rapidly unfolding events of a large crowd on the streets accompanying a pregnant woman in her late third-trimester about to enter the clinic, who could not be approached by Turner any other way than by entering the clinic grounds to await her arrival so Turner could counsel her not to have an abortion, presents sufficient minimum evidence that reasonable legal alternatives were not open to her and the proffered necessity or choice of two evils defense should have been heard by the jury.

c. Apparent Conflict With the Court

Significantly, Bailey ruled:

> Under any definition of these defenses, one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. LaFave & Scott 379 . . . .

444 U.S. at 410. First, the Tenth Circuit in Turner conspicuously left out the modifier "reasonable" before "legal alternative" (App. F, 16a) which skews any analysis of other means to accomplish the same result. Second, in necessity defense cases, the Court has emphasized that a "common sense" approach must be used. Baender v. Barnett, 255 U.S. 224, 226 (1921); Kirby, 74 U.S. at 487. Turner (App. F, 16a) cited Bailey, but also omitted the critical phrase "a chance both to refuse to do the criminal act and also to avoid the threatened harm." The record likewise was ignored: Turner scaled the clinic wall, entered its grounds, for the specific purpose of counseling with a late third-trimester pregnant woman about to enter the clinic not to have an abortion because she was unapproachable at this moment in time any other way. Turner could not have reached her by standing on the sidewalk. There was an evil to be avoided: the immediate threat of terminating human life, undisputed and undiscussed by the Tenth Circuit. Common sense dictates that Turner did not have a chance to both refuse the criminal act, entering the clinic confines which constitutes interference with federal marshals enforcement of the injunction, and also avoid the threatened harm since a late-third-trimester abortion was imminent.

3. *Third-Trimester Human Life Constitutionally Is a Protected Legal Interest*

a. Federal Common Law/Kansas Statute

Roe has been misread to allow abortions at any gestational stage,[13] which is an "overstatement" since "Roe did not declare an unqualified constitutional right to an abortion . . . the Court was not recognizing an absolute right, " Planned Parenthood v. Casey, 505 U.S. ___, 112 S. Ct. 2791, 2819, 120 L. Ed. 2d 674, 711, 713 (1992) (Casey). There exists a "substantial State interest in potential life throughout pregnancy, " Casey, 112 S. Ct. at 2799; 120 L. Ed. 2d at 714 (emphasis added), including an "interest in protecting the life of the unborn," 112 S. Ct. at 2818; 120 L. Ed. 2d at 712, especially after viability when "abortion can be prohibited" entirely except for therapeutic purposes, 112 S. Ct. at 2819, 120 L. Ed. 2d at 713; Roe v. Wade, 410 U.S. 113, 163-64 (1973). In Casey, the undue burden analysis specifically was used because of the "State's profound interest in potential life," which includes "expressing a preference for normal childbirth," 112 S. Ct. at 2818; 120 L. Ed. 2d at 712, 715-716. Justice O'Connor, in Casey, concluded after surveying Roe and successor cases: "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child," 112 S. Ct. 2817, 120 L. Ed. 2d at 710

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[13]Statements such as "[i]n light of Roe v. Wade [there exists] an immutable proposition that a necessity defense may not be invoked," Substantive Criminal Law, § 5.4 (1995 pocket part) at 65, and the "political protestor" use of the necessity defense is inapplicable to anti-abortion protestors since the"harm claimed . . . is not legally recognized in the United States," Government on Trial, 33 WAYNE L. REV. at 1226 text and fn. 1, are inaccurate as overly broad misreadings of Roe. For a correct assessment, see C. Torcia, 2 Whartons' Criminal Law §257 at 605 (5th ed. 1994).

(emphasis added). Roe and its progeny, judicial decision-making construing the Constitution that obviously is a unique federal interest, constitute federal common law in the absence of statutes or other acts by Congress on the subject. Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972).

At the time of Turner's arrest, Criminal Abortion, KAN. STAT. ANN. § 21-3407 (App. J, 26a) made unlawful the "unjustified" termination of a pregnancy from the date of conception to birth, except in exigent circumstances such as to save the life of the mother, if the child would be born with physical or abnormal defects, and pregnancy resulting from rape, incest, or other felonious intercourse.[14] Roe and its successor abortion decisions modified the Kansas statute sub silentio, Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988). The Tiller clinic regularly performed late third-trimester abortions (App. L, 28a-31a). Human life at this point, what Justice O'Connor calls a "developing child," constitutes a

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[14]A Kansas federal district court held unconstitutional provisions requiring certification of circumstances justifying an abortion by three physicians and those limiting performance of abortions to state-licensed hospitals. These were severed from the statute, leaving the other provisions intact including those prohibiting abortions altogether except for therapeutic reasons. Poe v. Menghini, 339 F. Supp. 986, 994-996 (D. Kan. 1972).

Kansas, on July 1, 1993, repealed this criminal abortion law, KAN. STAT. ANN. (1993 Supp.) and rewrote its abortion statute, KAN. STAT. ANN. §§ 65-6701 and 65-6703 (eff. July 1, 1992) (App. K, 27a) which prohibits abortions after "viability" -- defined as that stage of gestation, in the best medical judgment of the attending physician, when the fetus is capable of surviving outside the mother's womb. Violation is a misdemeanor, except where abortion is necessary to preserve the life of the mother or life threatening deformity or abnormality of the fetus.

sufficiently protected constitutional interest to satisfy the lesser of two evils prong enabling Turner to present the necessity defense to a jury.[15]

b. Reagan's Proclamation No. 5761

Turner made an offer of proof (App. M, 32a-37a) and relied on the statements of federal policy and law to support the "harm to be avoided" prong of the necessity defense that is contained in Reagan's Proclamation No. 5761, 3 C.F.R. 3-4 (1988 Comp.), 53 Fed. Reg. 1464 (1988) (Proclamation) (App. I, 23a, 25a) declaring "the unalienable personhood of every American from the moment of conception until natural birth" and recognizing Fifth and Fourteenth Amendment protections for the unborn. Proclamation ¶¶ 1, 4, 6-7. As a result of conferring the status of "personhood," "Proclamation No. 5761 added a class of humanity previously excluded by Roe -- the unborn from conception -- to those protected by the "equal protection" and "due process" requirements of the Constitution. The Proclamation is a public law, a legal act by the Executive Branch which can legislate, in effect, where there is no conflicting act of Congress. Youngstown Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J. concurring).

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[15]The Tenth Circuit's fear that recognition of a protected legal interest for the unborn, adopting the "civil anarchy" language from City of Wichita v. Tilson, 253 Kan. 285, 855 P.2d 911, 918, cert. denied, ___ U.S. ___, 114 S. Ct. 468, 126 L. Ed. 2d 420 (1993) (Tilson) (using the "per se" preclusion doctrine), is totally unwarranted. Demise, 81 CAL. L. REV. at 357, 384; Government on Trial, 33 WAYNE L. REV. at 1251-1253, rightly identify this phobia as false when the real judicial fear is that juries may acquit due to the necessity defense. Tilson involved a first trimester abortion, unlike Turner which involved a late third-trimester pregnancy.

Presidential proclamations which are published in the Federal Register have "general applicability" and therefore the imprimatur of law pursuant to an act of Congress, 44 U.S.C. § 1505(a)(1) (1989). Like executive orders, Letter Carriers v. Austin, 418 U.S. 264, 273, n.5 (1974). Presidential proclamations become the law of the land, United States v. Smith, 342 U.S. 225, 227 (1952). No law of Congress exists which either grants or denies "the unalienable personhood of every American from the moment of conception until natural death" nor denies this class of persons constitutional rights. Congress has been stalemated as the debate about abortion and protection of the unborn continues. But, the First Branch of government has taken the initiative and spoken: Reagan's Proclamation No. 5761.

Turner intends to more fully brief this matter, including the separation of powers and political question components, if certiorari is granted, which presents an issue of first impression never dealt with before by any federal court according to our research.

c. Scientific Evidence of Greater Harm

As a Christian, Turner's deeply held personal religious beliefs, Frazee v. Illinois Employment Security Dept, 489 U.S. 829, 833-835 (1989), that "personhood" begins at conception is corroborated by a body of existing evidence from the modern interdisciplinary science of genetics and molecular/cell biology which objectively supports the "greater harm to be avoided" prong of the necessity defense. This scientific evidence is so firmly established and undisputed as to be "scientific law" subject to judicial notice, Daubert v. Merrell Dow, 509 U.S. ___, 113 S. Ct. 2786. 2796 n. 11, 125 L. Ed. 2d 469, 482 n. 11 (1993), a Brandeis-type presentation-and-argument (App. N, 39a-43a) that the Tenth Circuit avoided, Turner (App. F, 13a).

The evidence is unassailable: the proximate cause of homo sapiens is the chemically DNA/genetic encoded words, language, and instructions -- the very essence that defines us as a person or individual -- contained in the first cell or cells immediately after conception. This preexisting cryptography, already intact, expressly provokes predetermined sequences, requiring no outside external intervention, causing purposeful, non-random, specific, continuous development over and over again repetitively in a myriad of astonishing cascading events, purposefully unfolding a precise design, following encoded plan after plan, from utmost simplicity to uttermost complexity, producing quantitatively enormous similarity and incredible individual uniqueness, all at the same time. The unchallengeable scientific fact is that these messages already encoded in the DNA/genes operate with infinite mathematical certitude to form each human being. This encoded word within the DNA/genes constitutes nothing less than "articulated personhood"!

This underlying scientific verity is explained in cases upholding the admission of "DNA fingerprinting" such as United States v. Yee, 134 F.R.D. 161, 169 (N.D. Ohio 1991). DNA already is being used to identify specific "individual persons" to either exonerate or prove criminal culpability. The same information is found in the first cells after conception. Only Justice White, dissenting in Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 792 (1986), prophetically recognized this truth with respect to when constitutional "personhood" should be recognized. Turner intends to more fully brief the matter, if certiorari is granted, which not only supports the scientific underpinning of Reagan's Proclamation No. 5761, but her own personal beliefs concerning the inception of "personhood." Again, the Court is presented with a novel issue of first impression.

4. *Issue Raised For the First Time on Appeal: Denial of A Constitutional Fair Jury Trial*

The Sixth Circuit, in reinstating the justification defense, ruled: "Our system guarantees the right of trial by jury in criminal cases, and the District Court should not have taken the question of duress from the jury on the basis of a flat rule that the defense is unavailable . . . ." Riffe, 28 F.3d at 570 (emphasis added), so long as there is "some evidence" or "even weak supporting evidence" of the proffered defense. This Court has admonished itself to be

> alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result [i.e. "per se" rule] will be to weaken or subvert what it conceives to be a principal of fundamental law of the land . . . such as the right to trial by jury [which] is of ancient origins, characterized by Blackstone as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy" (citation omitted) . . . .

Dimick v. Schiedt, 293 U.S. 474, 485 (1935) (emphasis added). The right to present a defense, Webb v. Texas, 409 U.S. 95, 98 (1972), is by way of the Sixth and Fifth Amendments (App. G, 21a) a fundamental constitutional right to confront one's accuser, Rock v. Arkansas, 483 U.S. 44, 52-53 (1987) (Rock); Crane v. Kentucky, 476 U.S. 683, 690 (1986) (Crane). "Per se" rules, Rock, 483 U.S. at 56-57, or "blanket prohibition," Crane, 476 U.S. at 690, which operate to exclude criminal defense evidence violate the fundamental right to a fair trial. The Tenth Circuit's "per se" exclusion of Turner's necessity defense is unconstitutional; see criticisms of the "per se" rule applied mechanically in political protestor cases as violating one's right to a jury trial, Demise, 81 CAL. L. REV. at 380-

384; Government on Trial, 33 WAYNE L. REV. at 1227-1228; Silencing the Defendant, 39 STAN. L. REV. at 1316-1326.

Turner is a case of first impression, Reed v. Ross, 468 U.S. 1, 14-16 (1984), asking the Court to answer several novel questions, therefore constitutional challenges may be raised for the first time on appeal. Butler v. McKellar, 494 U.S. 407, 412 (1990); Industrial Union Dept. v. American Petrol Inst., 448 U.S. 607, 615 (1980).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL C. McCLINTOCK
Counsel of Record

PROFESSOR MICHAEL C. McCLINTOCK
c/o Gonzaga University School of Law
P.O. Box 3528
Spokane, Washington 99220-3528
(509) 328-4220, ext. 3745
Counsel for Petitioner

APPENDIX A – INDICTMENT BY THE GRAND JURY, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (WICHITA DOCKET), OF MERRIE W. TURNER ALLEGING CRIMINAL VIOLATIONS OF 18 U.S.C. § 1509 AND 18 U.S.C. § 111, DATED AUGUST 29, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(WICHITA DOCKET)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal Action
	)	No. 91-10088-01
v.	)	
	)	18 U.S.C. 1509
MERRIE W. TURNER,	)	18 U.S.C. 111
Defendant.	)	

INDICTMENT

The Grand Jury charges:

COUNT I

On or about August 20, 1991, in the District of Kansas,

MERRIE W. TURNER

did by threat or force willfully prevent, obstruct, impede or interfere with the performance of duties by the United States Marshals Service under an Order by United States District Court Judge Patrick F. Kelly, District of Kansas, in

violation of Title 18, United States Code, Section 1509.

COUNT II

On or about August 20, 1991, in the District of Kansas,

MERRIE W. TURNER

did forcibly assault, resist, oppose, impede, intimidate or interfere with a Deputy United States Marshal, while the said Deputy United States Marshal was engaged in the performance of his official duties, in violation of Title 18, United States Code, Section 111.

A TRUE BILL

Aug. 27, 1991 — DATE

Florence C. Metcalf — FOREMAN OF THE GRAND JURY

Lee Thompson
LEE THOMPSON
United States Attorney
District of Kansas
401 N. Market, Room 306
Wichita, Kansas 67202
(316) 269-6481
Ks. S.Ct. No. 08361

(It is requested that trial be held in Wichita, Kansas.)

Bond fixed at: $5000 at 10%

(signed)
UNITED STATES DISTRICT JUDGE

APPENDIX B – DEFENDANT's PROPOSED JURY INSTRUCTION FOR "NECESSITY" OR "CHOICE OF TWO EVILS" DEFENSE, DATED NOVEMBER 10, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Filed: November 10, 1993

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 91-10088-01
	)	
vs.	)	
	)	
MERRIE W. TURNER,	)	
Defendant.	)	
	)	

DEFENDANT'S PROPOSED INSTRUCTIONS

NOW comes the defendant, Merrie W. Turner, by and through her attorney, Steven K. Gradert, Assistant Federal Public Defender for the District of Kansas, and offers to the Court the following proposed jury instruction in the above-captioned matter.

Respectfully submitted,

(signed)
STEVEN K. GRADERT
Assistant Federal Public Defender
District of Kansas
ATTORNEY FOR THE DEFENDANT

DEFENDANT'S PROPOSED JURY INSTRUCTION NUMBER _____:

An element of the government's case is that the defendant did not commit the crime charged in this case to avoid a greater evil. The defendant acted to avoid a greater evil if:

1. The evil she sought to avoid was greater than the evil sought to be prevented by the law defining the crime she is charged with committing.

2. The defendant believed that her conduct was necessary to avoid an evil to other persons; and

3. The defendant believed that her conduct was the least harmful alternative to avoid this evil.

Section 72.01, Federal Criminal Jury Instructions, Second Edition, Volume III, Josephine R. Potuto, Stephen A. Saltzburg, and Harvey S. Perlman.

APPENDIX C – UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ORDER, DATED NOVEMBER 23, 1993, DENYING DEFENDANT'S MOTION TO INSTRUCT JURY RE: "NECESSITY" DEFENSE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Filed: November 2, 1993

CLERK'S COURTROOM MINUTE SHEET - MOTIONS

Case No. 91-10088-01

APPEARANCES:

UNITED STATES OF AMERICA — ROBIN FOWLER

vs.

MERRIE W. TURNER — STEVEN GRADERT

JUDGE: Hon. Frank G. Theis
Clerk: Anne Butler
Reporter: MARILYN PETERSON — November 2, 1993

MOTIONS

MOTION BY DEFT. TO INSTRUCT THE JURY AS TO THE "NECESSITY" DEFENSE:

OVERRULED

MOTION BY DEFENDANT TO DISMISS FOR LACK OF JURISDICTION: OVERRULED.

APPENDIX D – UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, JUDGMENT IN A CRIMINAL CASE RE MERRIE WARREN TURNER, DATED NOVEMBER 16, 1993.

UNITED STATES DISTRICT COURT
_____District of Kansas

Filed: November 16, 1993

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 91-10088-01

UNITED STATES OF AMERICA

V.

MERRIE WARREN TURNER
aka: Merrie Foutz
(Name of Defendant)

Steven K. Gradert, Asst. Federal Public Defender
Defendant's Attorney

THE DEFENDANT:
☐ pleaded guilty to count(s)_____
☒ was found guilty on count(s) I of Indictment filed 8-28-91 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1509	OBSTRUCTION OF A COURT ORDER		I

ENTERED ON THE DOCKET
DATE: 11-17-93

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has be found not guilty on count(s) _____ and is discharged as to such counts(s).

☒ Count(s) I & II of Information filed 8-21-91 and Ct. II of Indictment filed 8-28-91 (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $ 25.00, for count(s) I of Indictment, which shall be due ☐ immediately ☒ as follows: payable to the Clerk, U.S. District Court.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

APPROVED: (signed)
Robin Fowler, Assistant
U.S. Attorney

Defendant's Soc. Sec. No.: 223-84-5226

Defendant's Date of Birth: 12-7-53

Defendant's Mailing Address:
Route 1, Box 365
Ashland, VA 23005

Defendant's Residence Address:
same as above.

November 5, 1993
Date of Imposition of Sentence

(signed)
Signature of Judicial Officer

HONORABLE FRANK G. THEIS
SENIOR U.S. DISTRICT JUDGE

DATE

PROBATION

The defendant is hereby placed on probation for a term of one (1) year .

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

1. Defendant shall complete 100 hours of community service, at the direction and discretion of the U.S. Probation Office.

2. Defendant is not to harass, intimidate or picket in front of any gynecological or abortion family planning services center.

STANDARD CONDITIONS OF SUPERVISION
(Directions Omitted)

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $ _____ to $ _____

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart form the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ **upon motion of the government, as a result of the defendant's substantial assistance.**

☒ **for the following reason(s): the Court did not wish to create a disparity between the sentence in this case and that of other codefendants.**

APPENDIX E – TENTH CIRCUIT JUDGMENT AND MANDATE DATED, FEBRUARY 15, 1995

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157

PATRICK FISHER
CLERK

February 15, 1995

Mr. Ralph L. DeLoach
United States District Court for the District of Kansas
204 United States Courthouse
401 North Market Street
Wichita, KS 67202

Re: 93-3370, USA v. Turner
Lower docket: 91-CR-10088-01

Dear Mr. DeLoach:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the judgment and a copy of the court's opinion, which constitute the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

Please call this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

By: (signed Jim Powers)
Deputy Clerk

PF:jtp

cc:

Braden W. Sparks
Michael C. McClintock
Robin D. Fowler, Asst. U.S. Attorney

APPENDIX F – TENTH CIRCUIT DECISION ON THE MERITS, 44 F.3d 900 (10th Cir. 1995)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED:
United States Court of Appeals
Tenth Circuit
JAN 24, 1995
PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
v.	)	No. 93-3370
	)	
MERRIE WARREN TURNER,	)	
aka Merrie Foutz,	)	
Defendant-Appellant.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 91-Cr-10088-01)

Robin D. Fowler (Randall K. Rathbun, United States Attorney, and Michael G. Christensen, Assistant United States Attorney, Wichita, Kansas, for Plaintiff-Appellee.

Braden W. Sparks (Michael C. McClintock, Gonzaga University School of Law, Spokane, Washington, with him on the briefs) of Braden W. Sparks, P.C., Dallas, Texas, for Defendant-Appellant.

Before BRORBY and McWILLIAMS, Circuit Judges, and BURCIAGA,* District Judge

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* The Honorable Juan G. Burciaga, District Judge for the District of New Mexico, sitting by designation.

The defendant, Merrie W. Turner, appeals the district court's decision refusing to instruct the jury on the defense of necessity and imposing certain limitations as conditions of her probation. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

BACKGROUND

Due to persistent antiabortion protests at a clinic in Wichita, Kansas, a preliminary injunction was issued on August 5, 1991, by a United States District Court in Wichita. The injunction prohibited, *inter alia*, "trespassing on, sitting in, blocking, impeding or obstruct[ing] ingress into or egress from any facility at which abortions, family planning, or gynecological services are provided by plaintiffs in Wichita, Kansas."

On August 20, 1991, Ms. Turner scaled the fence surrounding the Women's Health Care Services clinic with about forty other protesters. Ms. Turner testified she was at the clinic as a "sidewalk counselor" and entered the clinic in order to pray and place her body in front of a woman who was attempting to enter the clinic.

Ms. Turner was indicted for assault on a federal officer in violation of 18 U.S.C. § 111, and obstruction of a federal court order in violation of 18 U.S.C. § 1509. The assault charge was dropped and Ms. Turner was eventually convicted by a jury on the obstruction charge. Ms. Turner filed a motion for judgment of acquittal, which was denied by the district court. *United States v. Cooley*, 787 F. Supp. 977, 982-83 (D. Kan. 1992). On appeal, this court vacated and remanded that ruling on the ground the district

court judge should have recused himself from presiding over the trial. *United States v. Cooley*, 1 F.3d 985, 998 (10th Cir. 1993).

Ms. Turner was retried and again convicted. Judgment was entered against her and a sentence of one year supervised probation imposed. (Doc. 103.) This appeal followed.

DISCUSSION

A

Ms. Turner's primary claim on appeal is the district court erred in refusing to instruct the jury on the defense of necessity. "The refusal to give a particular jury instruction, even if the instruction is an accurate statement of the law, is within the discretion of the district judge." *United States v. Vasquez*, 985 F.2d 491, 496 (10th Cir. 1993). Moreover, while "a defendant is entitled to an instruction regarding [her] theory of the case, ... [a] defendant is not entitled to an instruction which lacks a reasonable legal and factual basis" *id.*; *see also United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991) ("A district court may preclude a necessity defense where 'the evidence ... is insufficient as a matter of law to support the proffered defense.'"), *cert. denied*, 112 S. Ct. 2980 (1992).

Ms. Turner argues the district court erred in refusing to provide the jury with the following instruction:

> An element of the government's case is that the defendant did not commit the crime charged in this case to avoid a greater evil. The defendant acted to avoid a greater evil if:
>
> 1. The evil she sought to avoid was greater than the evil sought to be prevented by the law defining the crime she is charged with

committing.

2. The defendant believed that her conduct was necessary to avoid an evil to other persons; and

3. The defendant believed that her conduct was the least harmful alternative to avoid this evil.

Invocation of the necessity defense requires a showing by the defendant that: (1) she was faced with a choice of evils and chose the lesser evil; (2) she acted to prevent imminent harm; (3) she reasonably anticipated a direct causal relationship between her conduct and the harm to be averted; and (4) she had no legal alternatives to violating the law. *Schoon,* 955 F.2d at 1239-40.

> The defense of necessity does not arise from a "choice" of several courses of action .... It can be asserted only by a defendant who was confronted with ... a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts. It is obviously not a defense to charges arising from a typical protest.

United States v. Seward, 687 F.2d 1270, 1276 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *see also United States v. Bailey*, 444 U.S. 394, 410 (1980) ("if there was a reasonable, legal alternative to violating the law ... the defenses [of necessity or duress] will fail").

While citing almost fifty cases holding that the defense of necessity does not apply to those who seek to obstruct access to, or the operations of abortion clinics, *see, e.g., City of Wichita v. Tilson*, 855 P.2d 911, 915-16 (Kan.) ("Every appellate court to date which has considered the issue has held that abortion clinic protestors ... are precluded, as a matte of law, from raising a necessity defense"), *cert. denied,*.[sic] 114 S. Ct. 468 (1993), Ms.

Turner nevertheless argues the defense of necessity applies here because "[s]he entered the clinic's premises for the express and sole purpose of educating this woman with essential information concerning medical facts related to fetal age as well as other available options should she wish to forego the abortion."

This case does not require us to examine each of the four elements needed to invoke the necessity defense (although there is precedent to support the conclusion that all four are wanting in cases such as this). Rather , Ms. Turner's appeal can be resolved solely on the basis that legal alternatives existed to her violating the law and thus, she was not entitled to have the jury instructed on the defense of necessity.

There is little question but that the goals of educating women concerning medical knowledge about abortions and alternatives to abortion could be achieved by any number of legal alternatives. *See, e.g., Zal v. Steppe,* 968 F.2d 924, 929 (9th Cir.) (noting necessity defense unavailable to abortion protestors because legal alternatives existed to achieve goal of persuading women not to have abortions), *cert. denied,* 113 S. Ct. 656 (1992); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350-52 (3rd Cir.) (same), *cert. denied,* 493 U.S. 901 (1989). For instance, Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests. Plainly, women can be, and in fact are educated on issues concerning abortion by legal means; violating the laws of the United States and ignoring orders of the federal courts are not the only way of doing so.[1]

---

[1] Although Ms. Turner does not argue the point, we note parenthetically her testimony that she entered the clinic to educate a *particular* woman does not change our conclusion that legal alternatives were available to her. First, it is axiomatic that

While it may be true, as Ms. Turner argues, that she could have taken more drastic means of educating women, this does not change the fact that the means she chose were illegal. As such, we conclude the defense of necessity is not available as a matter of law under the facts presented.

In addition, we agree with the observations of the Kansas Supreme Court that to permit the defense of necessity under facts similar to those presented here would not only be a receipt for disaster, but would call into question the very foundations of civil society and constitutional democracy.

> To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.

Tilson, 855 P.2d at 918. The district court properly refused to instruct the jury on the defense of necessity.

B

---

in targeting any given woman's health clinic for protest, the protestors seek to influence the individual woman who may patronize that clinic, though they may also seek to influence the public generally. Second, Ms. Turner could have espoused her views and provided information to this woman while standing on public property and within the permissible limits of the district court's injunction. In fact, Ms. Turner specifically testified that on the day of her arrest, before scaling the clinic walls, she "first handed literature to the women to educate them as I've done many years in the past and that they might have an informed decision."

Ms. Turner also argues the district court erred in imposing as a condition of her probation that she not "harass, intimidate or picket in front of any gynecological or abortion family planning services center." Without citing any authority, Mr. [sic] Turner asserts this condition amounts to a prior restraint in violation of her First Amendment liberties. A court has broad discretion in setting conditions probation. *United States v. Lawson*, 670 F.2d 923, 929 (10th Cir. 1982).

18 U.S.C. § 3563(b) provides discretionary conditions a sentencing court may impose as conditions of probation. Included among them are that the defendant:

> (6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;
>
> (7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons.

Incidental restrictions of First Amendment rights to freedom of speech and association are permissible if reasonably necessary to accomplish the essential needs of the state and public order. *Birzon v. King*, 469 F.2d 1241, 1243 (2d Cir. 1972). Courts have consistently upheld imposition of conditions of probation that restrict a defendant's freedom of speech and association when those conditions bear a reasonable relationship to the goals of probation. *Cf. Porth v. Templar*, 453 F.2d 330, 334 (10th Cir. 1971) (within discretion of trial court to restrict the probationer's association with "groups that would palpably encourage him to repeat his criminal conduct"); *see also United States v. Bortels*, 962 F.2d 558, 560 (6th Cir. 1992) (per curiam); *United States v. Showalter*, 933 F.2d

573, 575-76 (7th Cir. 1991); *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

There is no question here but that the conditions imposed on Ms. Turner bear a reasonable relationship to the goal of her probation. Given her deeply held convictions regarding abortion, it is not fantastic to speculate that if she were permitted to protest at abortion clinics, she might not be able to restrict her activities within lawful parameters. In order to help insure Ms. Turner does not repeat her criminal conduct, the district court did not abuse its discretion by imposing this condition as a term of her probation.

The judgment of the district court is **AFFIRMED**.

APPENDIX G – FEDERAL CONSTITUTIONAL PROVISIONS

- **AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ...; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX H – FEDERAL, CRIMINAL STATUTE
18 U.S.C. § 1509

Obstruction of court orders

Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined under this title or imprisoned not more than one year, or both.

No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.

APPENDIX I -- REAGAN'S PRESIDENTIAL PROCLAMATION NO. 5761 DATED JANUARY 15, 1988.

PROCLAMATION 5761 – NATIONAL SANCTITY OF HUMAN LIFE DAY, 1988

January 14, 1988

By the President of the United States of America

A PROCLAMATION

[3 C.F.R. 3-4 (1988 Comp.); 53 Fed. Reg. 1468 (1988)]

America has given a great gift to the world, a gift that drew upon the accumulated wisdom derived from centuries of experiments in self-government, a gift that has irrevocably changed humanity's future. Our gift is twofold: the declaration, as a cardinal principle of all just law, of the God-given, unalienable rights possessed by every human being; and the example of our determination to secure those rights and to defend them against every challenge through the generations. Our declaration and defense of our rights have made us and kept us free and have sent a tide of hope and inspiration around the globe.

One of those unalienable rights, as the Declaration of Independence affirms so eloquently, is the right to life. In the 15 years since the Supreme Court's decision in Roe v. Wade, however, America's unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.

We are told that we may not interfere with abortion. We are told that we may not "impose our morality" on those who wish to allow or participate in the taking of the life of infants before birth; yet no one calls it "imposing morality" to prohibit the taking of life after people are born. We are told as well that there exists a "right" to end the lives of unborn children; yet no one can explain how such a right can exist in stark contradiction of each persons' fundamental right to life.

That right to life belongs equally to babies in the womb, babies born handicapped, and the elderly or infirm. That we have killed the unborn for 15 years does not nullify this right, nor could any number of killings ever do so. The unalienable right to life is found not only in the Declaration of Independence, but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality -- that they in fact are persons. Modern medicine treats unborn children as patients. Yet, as the Supreme Court itself has noted, the decision in Roe v. Wade rested upon an earlier state of medical technology. The law of the land in 1988 should recognize all of the medical evidence.

Our Nation cannot continue down the path of abortion, so radically at odds with our history, our heritage, and our concepts of justice. This sacred legacy, and the well-being and the future of our country, demand that protection of the innocents must be guaranteed and that the personhood of the unborn be declared and defended throughout out land. In legislation introduced at my request in the First Session of the 100th Congress, I have asked the Legislative branch to declare the "humanity of the unborn child and the compelling interest of the several

states to protect the life of each person before birth." This duty to declare on so fundamental a matter falls to the Executive as well. By this Proclamation I hereby do so.

Now, Therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, ordain, and declare that I will take care that the Constitution and laws of the United Stats are faithfully executed for the protection of America's unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God. I also proclaim Sunday, January 17, 1988, as National Sanctity of Human Life Day. I call upon the citizens of this blessed land together on that day in their homes and places of worship to give thanks for the gift of life they enjoy and to reaffirm their commitment to the dignity of every human being and the sanctity of every human life.

In Witness Whereof, I have hereunto set my hand this 14th day of January, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

[Filed with the Office of the Federal Register, 10:50 a.m., January 15, 1988]

Note: The proclamation was released by the Office of the Press Secretary on January 15.

APPENDIX J – KANSAS STATUTE, CRIMINAL ABORTION; KAN. STAT. ANN. § 21-3407, L. 1969, Ch. 180, § 21-3407; July 1, 1970; Repealed, L. 1993, ch. 291, § 283; July 1, see K.S.A. 1994 Supp. at 337.

Criminal abortion. (1) Criminal abortion is the purposeful and unjustifiable termination of the pregnancy of any female other than by a live birth.

(2) A person licensed to practice medicine and surgery is justified in terminating a pregnancy if he believes there is substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother or that the child would be born with physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse; and either:

(a) Three persons licensed to practice medicine and surgery, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the hospital licensed by the state board of health and accreditation of hospitals where it is to be performed, or in such other place as may be designated by law; or

(b) An emergency exists which requires that such abortion be performed immediately in order to preserve the life of the mother.

(3) For the purpose of this section pregnancy means that condition of a female from the date of conception to the birth of her child.

(4) For the purpose of subsection (2) of this section all illicit intercourse with a female under the age of sixteen (16) years shall be deemed felonious.

(5) Criminal abortion is a class D felony.

APPENDIX K – KANSAS STATUTE, ABORTION PROHIBITED WHEN FETUS VIABLE, ETC., KAN. STAT. ANN. § 65-6703 (Cum. Supp. 1994), L. 1992, Ch. 183, § 3; L. 1993, Ch. 291 § 240, July 1.

Abortion prohibited when fetus viable, exceptions; penalty. (a) No person shall perform or induce an abortion when the fetus is viable unless such person is a physician and has a documented referral from another physician not financially associated with the physician performing or inducing the abortion and both physicians determine that: (1) The abortion is necessary to preserve the life of the pregnant woman; or (2) the fetus is affected by a severe or life-threatening deformity or abnormality.

APPENDIX L – EXTRACTS FROM LAURA TIVIS' AFFIDAVIT, OFFER OF PROOF BY TURNER IN SUPPORT OF THE NECESSITY DEFENSE, THE FEDERAL DISTRICT COURT OF KANSAS, NOVEMBER 3, 1993, ALSO PART OF APPELLANT'S TENTH CIRCUIT APPENDIX, TAB E.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Case No.
vs.	)	91-10088-01
MERRIE W. TURNER, Defendant.	)	

AFFIDAVIT OF LAURA TIVIS

Defendant, Merrie W. Turner, by and through counsel, Steven K. Gradert, Assistant Federal Public Defender for the District of Kansas, submits to the Court, an Affidavit, which is attached hereto, in support of defendant's jury instruction of a lesser of two evils.

Respectfully submitted,

(signed)
STEVEN K. GRADERT
Asst. Federal Public Defender
for the District of Kansas
Sup. Ct. No. 12781

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Affidavit was hand deliver [sic] on this 3rd day of November, 1993 to:

ROBIN FOWLER
Assistant U.S. Attorney
301 N. Main, Suite 1200
Wichita, KS 67202

(signed)
STEVEN K. GRADERT

AFFIDAVIT

STATE OF KANSAS,)
) ss:
COUNTY OF SEDGWICK)

The undersigned, after having been duly sworn upon her oath, states as follows:

From April through November of 1988, I worked for Mr. George R. Tiller, at his Women's Health Care Services, located at 5107 East Kellogg, Wichita, Kansas.

My duties included, but were not limited to medical records processing and entries, medical correspondence, marketing and sales mailings; and telephone answering, with scheduling of patient appointments.

During the regular performance of my duties, I was instructed by George Tiller to falsify the fetal age of the aborted babies in the medical records. I was also required by Tiller to lie to patients on the phone, and to tell them that their pregnancy was not as advanced as other medical diagnosis had indicated. My instruction from Tiller indicated that falsification of medical records was a standard operating procedure.

This falsification of fetal age in the medical records effectively represented actual third trimester babies, as falsely being second trimester abortions. These are viable babies at seven to nine months gestation, who could live outside the womb. Tiller slaughters over 1,000 such perfectly healthy, viable babies every year.

[omissions]

Nothing in the operation of Tiller's business since 1988 indicates that he has swerved from his repeatedly stated intention to continue his practice of specializing in third trimester abortions.

[omissions]

Diane Gianelli, of AMERICAN ABORTIONS MEDICAL NEWS, based in Washington D.C., reported that a doctor in Southern California, who does abortions up to 40 weeks for fetal abnormality, refers all of his requests for third trimester abortions on-demand, to George Tiller.

[omissions]

After the babies are delivered in the basement, Tiller carries the little bodies, stacked in a cardboard box, upstairs to the crematorium room in the northeast corner of the clinic, and burns them up. Last year, two babies were born alive in Tiller's basement, but did not survive. Their mothers were required by Tiller to sign death certificates.

[omissions]

FURTHER, AFFIANT SAITH NOT.

(signed)
LAURA TIVIS

Subscribed and sworn to before me this 3rd day of November, 1993.

(signed Merri J. Hagel
Notary Public

My Commission Expires:
09/14/97

APPENDIX M – EXEMPLAR OF J. THOMAS SMITH'S AFFIDAVIT, OFFER OF PROOF BY TURNER IN SUPPORT OF THE NECESSITY DEFENSE, FILED WITH THE FEDERAL DISTRICT COURT OF KANSAS, NOVEMBER, 21, 1993, AS PART OF APPELLANT'S TENTH CIRCUIT APPENDIX, TAB. H.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 91-10088-01
MERRIE W. TURNER, Defendant.	)	

AFFIDAVIT OF J. THOMAS SMITH

Defendant, Merrie W. Turner, by and through counsel, Steven K. Gradert, Assistant Federal Public Defender for the District of Kansas, submits to the Court, an Affidavit by J. Thomas Smith, which is attached, in support of "Necessity Defense" proffered by Defendant, Merrie W. Turner.

Respectfully submitted,
(signed)
STEVEN K. GRADERT
Assistant Federal Public Defender
for the District of Kansas
Sup. Ct. No. 12781

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **Affidavit** was hand delivered on this 24th day of November, 1993 to:

ROBIN FOWLER
Assistant U.S. Attorney
301 N. Main, Suite 1200
Wichita, KS 67202

(signed)
STEVEN K. GRADERT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, PLAINTIFF	)	
VS.	)	Criminal Case No. 91-10088
MERRIE W. TURNER, DEFENDANT	)	

AFFIDAVIT BY J. THOMAS SMITH IN SUPPORT OF "NECESSITY DEFENSE" PROFFERED BY DEFENDANT MERRIE TURNER

State of Tennessee}
County of Williamson}

I, J. Thomas Smith, Jr., being duly sworn, make

oath as follows:

1. I am an attorney called to testify as an expert witness on behalf of the defendant Merrie Turner concerning the "Natural Law" and the legal effect of Proclamation No. 5761 signed by Ronald Wilson Reagan on January 14, 1988, and set forth herein a summary of the testimony I was prepared to offer in the defense of the Defendant Merrie Turner.

2. As my qualification as an expert on the subject of the "Natural Law," and the authority of the President of the United States, I assert that I have been an attorney engaged in the practice of federal and state law with a focus on international law since my admission to practice by the Supreme Court of the State of Tennessee in June, 1973. I received a B.A. degree in 1969, and my J.D. degree in 1973 from Vanderbilt University in Nashville, Tennessee. While in law school, private and public international law was a primary focus of my studies. I served as President of the Vanderbilt International law Society and as Articles Editor of the

Vanderbilt Journal of Transnational Law. I also served as Chairman of the 1972 Symposium and Regional Meeting of the American Society of International Law. Upon entering private practice, I continued my work in this area with a medium-sized multinational corporation where I supervised litigation and other legal matters for company operations involving sales in over a hundred countries and manufacturing facilities in twelve countries. I served that company as its chief legal officer for five (5) years and held the title of Vice-President Law when I resigned in 1982. As a principal/shareholder in a law firm of twenty lawyers from 1982 to 1987 and a law firm of a hundred lawyers from 1987 to 1990, I continued my work in public and private international law. From 1976 to 1987 I served as a member of the Advisory Board, and from 1977 to 1987 as a Research Fellow of the International and Comparative Law Center of the Southwestern Legal Foundation in Dallas, Texas. From 1975 to 1987, I served as a member of the Nashville Foreign Relations Committee, an adjunct of the National Council on Foreign Relations. In 1987, I was

appointed by the Secretary of Commerce as a member of the Tennessee Export Council. I am also a member of the Bar of the Supreme Court of the United States. My study and experience in the field of international law has led me to a basic understanding of the authority of the President of the United States because he is the primary source of treaty law involving the United States, which is public international law, promulgated subject to the advice and consent of the Senate, pursuant to Article II, Section 2 of the Constitution of the United States. The scope of the President's authority in wartime and in domestic matters is also a traditional part of curricula in international law. "Natural Law" is also considered a "source" of international law tracing its roots back to Grotius and his writings on the law of nations.

From 1990 to the present i have established my own practice, and have been working as a volunteer and member of the board of directors of America 21, Family Values for the 21st Century, a national organization formed to promote education and encourage activism concerning

family values and issues at the local, state and federal levels of government. On the board of directors are a group of courporate [sic] leaders of national businesses, presidents of colleges and universities, administrator of a foundation, and pastors of some of the largest churches in different denominations including Southern Baptist, Presbyterian (P.C.A.), Churches of Christ, Pentecostal, and Interdenominational. In my work for this organization I have gained experience in the legal issues concerning abortion.

3. PROCLAMATION NO. 5761 ISSUED BY PRESIDENT RONALD WILSON REAGAN ON JANUARY 14, 1988 IS POSITIVE FEDERAL LAWS WHICH GRANTS CONSTITUTIONAL PROTECTION TO EVERY UNBORN CHILD FROM CONCEPTION AND IS THE LAW OF THE LAND UNTIL OTHERWISE LAWFULLY CHANGED, AND STATES IN PART:

****OMISSIONS****

[continues with 20 pages of scholarly/legal analysis of the validity/enforcibility of Proclamation No. 5761]

Further affiant sayeth not.

(signed)
J. Thomas Smith, Jr.

STATE OF TENNESSEE}
COUNTY OF WILLIAMSON}

Sworn to and subscribed before me
this 13th day of Nov., 1993

(signed)
NOTARY PUBLIC

My Commission Expires: 5/28/95

APPENDIX N – EXEMPLAR OF GENETIC AND MOLECULAR/CELL BIOLOGY RESEARCH, Appellant's Addendum, Tab F (28pp), Supporting Turner's Argument That Her Belief Concerning The Nature Of Fetal Life Was Rational, Corrected Brief for Appellant at pp. 34-46, United States v. Turner, 44 F.3d 900 (10th Cir. 1995 (No. 93-3370)

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LISTING OF SCHOLARLY PUBLICATIONS/ REFERENCES AND THEIR ABBREVIATIONS

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3. H. MOROWITZ & J. TREFIL, THE FACTS OF LIFE 1-166 (1992) (FACTS OF LIFE)

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["Text" extracts contained on Add. F-4 through F-29]